UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TERRAFORM LABS, PTE. LTD. and DO HYEONG KWON, Defendants.	Civil Action No. 1:23-cv-01346-JSR Hon. Jed S. Rakoff

DEFENDANT DO KWON'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO NOTICE DEPOSITION OR FOR ALTERNATIVE RELIEF

Douglas W. Henkin
David L. Kornblau
Dentons US LLP
1221 Avenue of the Americas
New York, New York 10020
Tel: (212) 768-6700
douglas.henkin@dentons.com

Mark G. Califano
Dentons US LLP
1900 K Street, NW
Washington, DC 20006-1102
Tel: (202) 496-7500
mark.califano@dentons.com

Attorneys for Defendants

TABLE OF AUTHORITIES

Page(s)

Cases

In re Grand Jury Proceeding,
971 F.3d 40 (2d Cir. 2020)....4

Hilliard v. Murphy Land Co., LLC,
No. 1:18-cv-00232-DCN, 2019 WL 6702410 (D. Id. Dec. 9, 2019), *aff'd*, 835 Fed. Appx. 292 (9th Cir. Feb. 4, 2021)....4

Hughey v. JMS Dev. Corp.,
78 F.3d 1523 (11th Cir. 1996)....4

Loubriel v. United States,
9 F.2d 807 (2d Cir. 1926)....4

In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.,
725 F.3d 65 (2d Cir. 2013)....5

Nat'l Org. for Marriage, Inc. v. Walsh,
714 F.3d 682 (2d Cir. 2013)....4

SEC v. Hong,
CV-20-04080 MCS (RAOx), 2012 WL 8531666 (C.D. Cal. May 18, 2021)....3

Rules and Regulations

Judge Rakoff's Individual Rules of Practice
Rule 2(a)....4
Rule 2(b)....4

Federal Rules of Civil Procedure
Rule 30....3
Rule 30(a)(2)(B)....2

Other Authorities

Black's Law Dictionary 912 (6th ed. 1990)....4

Preliminary Statement

The SEC's motion seeks leave to take the deposition of Defendant Do Kwon in the United States before October 13, 2023, even though the SEC knows that Mr. Kwon is detained in Montenegro with no scheduled release or extradition date. The motion should be denied because it would be impossible for Mr. Kwon to appear for such a deposition. The SEC's request for alternative relief—an order precluding Defendants from submitting a statement by Mr. Kwon on summary judgement—should also be rejected. That request violates the Court's Individual Rules of Practice because the SEC did not obtain the Court's permission to seek a preclusion order in the parties' pre-motion call to Chambers. Moreover, the SEC's request for a preclusion order is not ripe because neither party has filed a summary judgment motion and the deadline for summary judgment motions is a month away.

Background

Mr. Kwon's detention in Montenegro in March 2023 was widely reported. The SEC (whose Office of International Affairs has expertise in requests for international judicial assistance) first indicated to defense counsel that it wanted to take Mr. Kwon's deposition in June 2023, and waited over five months after Mr. Kwon's detention to submit a proposed Letter of Request under the Hague Evidence Convention ("LOR") to this Court, on August 30, 2023. Mr. Kwon did not oppose the SEC's proposed LOR, which this Court signed on the same day it was submitted and invited the SEC to pick up the following morning. *See* Ex. A. The SEC did not deliver the LOR to the Montenegrin authorities until September 14, 2023—one month before the discovery cut-off date (October 13, 2023) that the Court had extended at the SEC's request. *See* ECF Docket No. 44.

Contrary to the SEC's misrepresentations (SEC Mem. at 1, 8), Mr. Kwon has *not* refused to "provid[e] the SEC an opportunity to depose him" and does *not* "oppose[] the SEC noticing his own deposition." The SEC is well aware that Mr. Kwon has *never* opposed the SEC's efforts to depose him. Although Mr. Kwon already testified for approximately 21 hours during the SEC's nearly two-year investigation—two five-hour days of testimony under oath from Mr. Kwon pursuant to an SEC subpoena, five hours of compelled testimony under oath taken by the Monetary Authority of Singapore at the request and with the participation of the SEC, and six hours of voluntary interviews with the SEC—Mr. Kwon *consented* to the SEC's request that this Court issue the LOR for his deposition. *See* Ex. A (SEC acknowledging in its email submitting its proposed LOR to this Court that "Counsel for Terraform and Do Kwon have informed us that they *do not oppose* this request.") (emphasis added). Thus, the SEC's assertion that it is "being denied its fundamental right to gather the relevant facts" (SEC Mem. at 7) is baseless.

In addition, four days before the SEC filed this motion, defense counsel advised the SEC that Mr. Kwon would *not oppose* a request for leave to take his deposition pursuant to Rule 30(a)(2)(B) provided that the deposition take place in Montenegro in accordance with the terms of the LOR. The SEC rejected that proposal, declaring that "we do intend to notice the deposition for a date certain in the United States." Ex. B. The SEC subsequently informed Defendants' counsel that the "date certain" would be on or before October 13, 2023.

Inexplicably, the SEC's brief says nothing about the location of the deposition, which was the only point of dispute between the parties. Invoking Fed. R. Civ. P. 30(a)(2)(B), the SEC asks the Court to grant it leave to take the deposition of a person "confined in prison," omitting that it intends to notice the deposition to occur over 4,500 miles away from the jail in which Mr. Kwon is detained by a foreign sovereign. To put it mildly, that is a material omission.

On September 25, 2023, a Montenegrin Court indicated informally (without issuing any ruling or order) that it may hold a hearing on October 13 or October 26, 2023 for the purpose of asking Mr. Kwon the questions that the SEC drafted and included in its LOR.[1] In a call with the Court's law clerk on September 26, 2023, the SEC stated that, even if Mr. Kwon answers those questions in the Montenegrin Court, the SEC may deem that process—*which it asked the Court to request*—inadequate and seek another deposition of Mr. Kwon in the United States after the discovery cut-off period. The SEC has not asked this Court to withdraw the LOR, which this Court issued at the SEC's request and without objection from Mr. Kwon. Thus, the SEC seeks to have its cake and eat it too by *simultaneously* (1) permitting the Montenegrin Court to question Mr. Kwon under the LOR requested by the SEC, (2) reserving the right to disregard Mr. Kwon's answers if it does not like them, *and* (3) seeking leave from this Court to take Mr. Kwon's deposition in the United States while he is detained in Montenegro.[2]

Argument

I.

THE COURT SHOULD DENY THE SEC LEAVE
TO DEPOSE MR. KWON IN THE UNITED STATES

The Court should deny the SEC's motion for the simple reason that it is currently impossible for Mr. Kwon to appear for a deposition in the United States. "The law does not

[1] In the Montenegrin Court's informal statement about the hearing, it also indicated that Mr. Kwon would not have the right to have counsel represent him and participate in the hearing. If the hearing were to proceed on that basis, Mr. Kwon would object to it as inconsistent with his right to due process under the United States Constitution.

[2] In the call with the Court's law clerk on September 26, 2023, the SEC attempted to justify its position by citing *SEC v. Hong*, CV-20-04080 MCS (RAOx), 2012 WL 8531666 (C.D. Cal. May 18, 2021). But in that case a Magistrate Judge held only that the SEC would not be precluded from deposing the defendants under Fed. R. Civ. P. 30 if a foreign court limited the SEC's ability to question them (or if the questioning did not occur prior to the discovery cut-off) *pursuant to an LOR issued at the defendants' request*. The case provides no support for the SEC's effort in this case to obtain a deposition under *its own* LOR while *also* reserving the right to take another Rule 30 deposition if it does not like the results of its own LOR.

compel the doing of impossibilities." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (citing *Black's Law Dictionary* 912 (6th ed. 1990)). An order mandating something that is impossible serves no practical purpose and risks undermining judicial authority, because the Court could not mandate compliance. *See, e.g., In re Grand Jury Proceeding*, 971 F.3d 40, 50 (2d Cir. 2020) ("Compliance with [a subpoena issued by a grand jury whose term had expired] was obviously impossible, and the district court lacked the power to compel the impossible through coercive sanctions.") (citing *Loubriel v. United States*, 9 F.2d 807, 809 (2d Cir. 1926) (Learned Hand, J.)). Such an order would also "merely amount to an [impermissible] advisory opinion, as the Court could not order [Mr. Kwon] to do the impossible." *Hilliard v. Murphy Land Co., LLC*, No. 1:18-cv-00232-DCN, 2019 WL 6702410, at * 7 (D. Id. Dec. 9, 2019), *aff'd*, 835 Fed. Appx. 292 (9th Cir. Feb. 4, 2021).

II.

THE COURT SHOULD ALSO DENY THE SEC'S REQUEST FOR A PRECLUSION ORDER

The alternative relief sought by the SEC—an order precluding Defendants from using a declaration of Mr. Kwon on summary judgment—violates this Court's Individual Rules 2(a) and 2(b). The SEC never advised Defendants' counsel that it intended to seek a preclusion order and filed the motion without stating during the parties' pre-motion call to Chambers that it would seek a preclusion order, as alternative relief or otherwise. That failure alone is reason to deny the SEC's request.

Moreover, even if the Court excused the SEC's failure to comply with the Court's Individual Rules, the SEC's request for a preclusion order is not ripe because "it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (internal quotations omitted).

All of the cases cited in the SEC's brief involving preclusion orders (at pp. 8-9) involved motions to strike witness statements that had *already been submitted* in connection with *pending* summary judgment motions. In this case, neither side has moved for summary judgment and the summary judgment motions are not due to be filed for another month (by October 27, 2023). The ripeness doctrine therefore prevents this Court from "entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 110 (2d Cir. 2013).

III.

THE COURT SHOULD DISREGARD THE SEC'S
IRRELEVANT MISCHARACTERIZATION OF EVIDENCE

Finally, the SEC misstates evidence in its gratuitous effort to prejudice Mr. Kwon in a procedural motion having nothing to do with the merits (or lack of merit) of the SEC's case. The SEC incorrectly claims that a chat attached to its brief "details how [Mr. Kwon] intended to use Chai to create fake transactions on the Terra blockchain, which would appear real and generate fees." (SEC Mem. at 5.) But that chat actually shows Mr. Kwon and Daniel Shin discussing the possibility of staking LUNA tokens to validators and generating transactions between LUNA wallets, *not* generating fake Chai transactions. *See id.* at 6 (Mr. Shin: "i.e., when will we start to stake … ."). The SEC does not allege that the transactions discussed in the chat actually occurred or were not disclosed, and the Amended Complaint alleges instead that TFL did not settle Chai transactions on the Terra blockchain (which Defendants have denied), not that anyone generated fake Chai or other blockchain transactions. In other words, the SEC's motion relies on misrepresentations about irrelevant evidence to support its spurious claim that it has been unable to get discovery from Mr. Kwon.

Conclusion

For the foregoing reasons, the SEC's motion should be denied in its entirety.

Dated: September 27, 2023

Respectfully submitted,

/s/ Douglas W. Henkin

Douglas W. Henkin
David L. Kornblau
Dentons US LLP
1221 Avenue of the Americas
New York, New York 10020
Tel: (212) 768-6700
douglas.henkin@dentons.com

Mark G. Califano
Dentons US LLP
1900 K Street, NW
Washington, DC 20006-1102
Tel: (202) 496-7500
mark.califano@dentons.com

Attorneys for Defendants

EXHIBIT A

From: Rakoff NYSD Chambers <RakoffNYSDChambers@nysd.uscourts.gov>
Date: August 30, 2023 at 7:09:58 PM EDT
To: "Cuellar, Carina" <CuellarC@sec.gov>
Cc: "Staren, Devon" <StarenD@sec.gov>, "Carney, Christopher" <CarneyC@sec.gov>, "Meehan, Laura" <MeehanLa@sec.gov>, "Connor, James" <connorja@sec.gov>, "Kornblau, David" <david.kornblau@dentons.com>, "Henkin, Douglas W." <douglas.henkin@dentons.com>, "Califano, Mark G." <mark.califano@dentons.com>, "Lafferman, Matthew A." <Matthew.Lafferman@dentons.com>
Subject: RE: SEC v. Terraform Labs, 23-cv-1346/Additional Proposed Letter of Request to Montenegro

[WARNING: EXTERNAL SENDER]

Counsel,

I have attached the signed letter of request. Please let me know if you will need the original signed letter; if so, you are welcome to arrange for it to be picked up at chambers tomorrow.

Thank you,
Neil

David Kornblau
Partner

+1 212 768 6890 | US Internal 16890
New York

From: Cuellar, Carina <CuellarC@sec.gov>
Sent: Wednesday, August 30, 2023 9:47 AM
To: Rakoff NYSD Chambers <RakoffNYSDChambers@nysd.uscourts.gov>
Cc: Staren, Devon <StarenD@sec.gov>; Carney, Christopher <CarneyC@SEC.GOV>; Meehan, Laura <MeehanLa@SEC.GOV>; Connor, James <connorja@SEC.GOV>; Kornblau, David <david.kornblau@dentons.com>; Henkin, Douglas W. <douglas.henkin@dentons.com>; Califano, Mark G. <mark.califano@dentons.com>; Lafferman, Matthew A. <Matthew.Lafferman@dentons.com>
Subject: RE: SEC v. Terraform Labs, 23-cv-1346/Additional Proposed Letter of Request to Montenegro

CAUTION - EXTERNAL:

Good Morning Neil,

Will do. You should receive an email this morning.

Kind regards,

Carina

Carina A. Cuellar
Trial Counsel | Division of Enforcement
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
(202) 551-6414 (office) | (771) 209-1133 (cell)
cuellarc@sec.gov

From: Rakoff NYSD Chambers <RakoffNYSDChambers@nysd.uscourts.gov>
Sent: Wednesday, August 30, 2023 9:43 AM
To: Cuellar, Carina <CuellarC@sec.gov>
Cc: Staren, Devon <StarenD@sec.gov>; Carney, Christopher <CarneyC@SEC.GOV>; Meehan, Laura <MeehanLa@SEC.GOV>; Connor, James <connorja@SEC.GOV>; Kornblau, David <david.kornblau@dentons.com>; Henkin, Douglas W. <douglas.henkin@dentons.com>; Califano, Mark G. <mark.califano@dentons.com>; Lafferman, Matthew A. <Matthew.Lafferman@dentons.com>
Subject: RE: SEC v. Terraform Labs, 23-cv-1346/Additional Proposed Letter of Request to Montenegro

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good morning Carina,

Please send the files via your file transfer service; I am happy to log in and download them that way.

Thank you,
Neil Alacha
Law Clerk to the Hon. Jed S. Rakoff

From: Cuellar, Carina <CuellarC@sec.gov>
Sent: Wednesday, August 30, 2023 9:24 AM
To: Rakoff NYSD Chambers <RakoffNYSDChambers@nysd.uscourts.gov>
Cc: Staren, Devon <StarenD@sec.gov>; Carney, Christopher <CarneyC@SEC.GOV>; Meehan, Laura <MeehanLa@SEC.GOV>; Connor, James <connorja@SEC.GOV>; Kornblau, David <david.kornblau@dentons.com>; Henkin, Douglas W. <douglas.henkin@dentons.com>; Califano, Mark G. <mark.califano@dentons.com>; Lafferman, Matthew A. <Matthew.Lafferman@dentons.com>
Subject: SEC v. Terraform Labs, 23-cv-1346/Additional Proposed Letter of Request to Montenegro

CAUTION - EXTERNAL:

Good Morning Neil,

Please find attached for Judge Rakoff's approval a Letter of Request for the Taking of Evidence to the Judicial Authority of Montenegro. Counsel for Terraform and Do Kwon have informed us that they do not oppose this request.

Please note that the exhibits are too large to send in one email, but we can either break them up into a series of emails or send via our file transfer service, which would require logging in and downloading. Please let me know which one you prefer.

Kind regards,

Carina

Carina A. Cuellar
Trial Counsel | Division of Enforcement
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
(202) 551-6414 (office) | (771) 209-1133 (cell)
cuellarc@sec.gov

CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

EXHIBIT B

Archived: Sunday, September 24, 2023 5:00:11 PM
From: Cuellar, Carina
Mail received time: Mon, 18 Sep 2023 20:44:54
Sent: Monday, September 18, 2023 4:44:54 PM
To: Kornblau, David
Cc: Connor, James
Subject: Leave to subpoena Do Kwon Deposition
Importance: Normal
Sensitivity: None

[WARNING: EXTERNAL SENDER]

Hi David,

I spoke to Jim, and we do intend to notice the deposition for a date certain in the United States. We will not agree to add the language "or a date TBD by the Montenegrin Authorities."

Please feel free to call or email with any questions,

Carina